No. 21883

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRITISH AUTO PARTS, INC.,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

OPENING BRIEF OF APPELLANT BRITISH AUTO PARTS, INC.

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Jurisdictional Statement.

Under 28 U.S.C. 1291 this Court has jurisdiction to hear appeals with respect to final orders of the District Courts. The order of the District Court below enforcing a subpena of the National Labor Relations Board is such a final order.

Statement of the Case.

This action was commenced by Appellee, National Labor Relations Board, seeking enforcement of its Subpena. The Subpena issued by the Board sought the production of the names and addresses of the employees of Appellant, British Auto Parts, Inc., pursuant to the Board's *Excelsior* Rule.

British Auto Parts, Inc. is an employer engaged in the importation and wholesale distribution of automo-

bile parts in interstate commerce. [Fndg. 2, Clk. Tr. 94.] Appellee is an administrative agency established by the National Labor Relations Act (referred to hereafter as the "Act" [29 U.S.C. §151 *et seq.*]) and is empowered and directed to administer the provisions of that Act, including the investigation of questions of employee representation under §9 thereof. (29 U.S.C. §159.) [Fndg. 1, Clk. Tr. 94.]

On March 17, 1966, a labor organization (General Warehousemen, Local Union No. 598, International Brotherhood of Teamsters Chauffers Warehousemen and Helpers of America) filed a petition with the Board's 21st Region at Los Angeles, California, asserting its claim to represent Appellant's employees and seeking a representation election to establish its majority status. The proceedings instituted by this petition were known on the records of the Board as Case No. 21-RC-9986. [Fndg. 4, Clk. Tr. 94.]

On April 12, 1966, the Regional Director of the 21st Region approved a Stipulation For Certification Upon Consent Election entered into by Appellant and the Union. [Fndg. 5, Clk. Tr. 94.] On April 19, 1966, Appellant filed with the Regional Director an Election Eligibility List which contained the names of its employees, but omitting their addresses. [Fndg. 9, Clk. Tr. 95.]

On May 2, 1966, an election was conducted in which three employees cast valid ballots for the Union and four cast valid ballots against. The Board, however, sustained the Union's objection to the election on the ground that Appellant had refused to furnish the addresses of its employees to the Board pursuant to its

Excelsior Rule, and set the election aside. A second election was directed. (160 N.L.R.B. No. 40.) [Fndg. 10, Clk. Tr. 95.]

On August 4, 1966, the Regional Director notified Appellant that a second election was to be conducted on September 12, 1966, and requested that an election eligibility list of Appellant's employees' names and addresses be filed not later than August 11, 1966, as required by the Board's order and the *Excelsior* Rule. [Fndg. 11, Clk. Tr. 95.] Appellant did not furnish an election eligibility list containing the addresses of its employees pursuant to the *Excelsior* Rule. [Fndg. 12, Clk. Tr. 95.]

Thereafter, the Union notified the Regional Director that it did not wish to proceed to the second election until Appellant furnished the eligibility list containing both the names *and* addresses of its employees. The Regional Director thereafter notified the parties that the second election had then been postponed. [Fndg. 13, Clk. Tr. 95.]

On September 4, 1966, the Regional Director caused a Subpena Duces Tecum to be issued directing Appellant to produce and make available to the Board's Regional Office, personnel and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all the employees eligible to vote in the election. [Affd. of Norman E. Jones, Ex. "D".] The Subpena was served on Appellant by registered mail on September 15, 1966. [Affd. of Norman E. Jones 2, Clk. Tr. 76.] On September 20, 1966, Appellant filed a Petition To Revoke The Subpena pursuant to §102.31 (b) of the Board's rules and regulations. [Affd. of Norman E. Jones 2, Clk. Tr. 76.] This Petition To

Revoke was denied by formal telegraphic order issued on September 22, 1966. [Affd. of Norman E. Jones, Ex. "G".]

Although this Subpena called for Appellant's appearance before Ralph E. Kennedy, Regional Director; when Appellant appeared at the time and place designated in said Subpena, Ralph E. Kennedy was absent. [Affd. of Norman E. Jones, 2-3, Clk. Tr. 76-77.]

On October 3, 1966, the Regional Director caused a second Subpena Duces Tecum to be issued, directing Appellant to produce and make available to the Board's Regional Office Appellant's personnel and payroll records, or an eligibility list in lieu thereof, containing the names and addresses of all employees eligible to vote in the election. [Fndg. 14, Clk. Tr. 96.] The second Subpena was identical to the first Subpena save only for the date of appearance. [Affd. of Norman E. Jones, Exs. "D" and "I".] The Subpena was served upon Appellant by registered mail on October 4, 1966. Appellant did not file a Petition To Revoke this Subpena. The District Court concluded that the filing of such a Petition would have been an idle and futile act. Appellant appeared on October 12, 1966, the return date of the Subpena, but did not produce the materials called for. [Fndg. 16, Clk. Tr. 96.]

Appellant has at all pertinent times maintained the policy of strict confidentiality with respect to its employees' names and addresses. Each applicant for employment with Appellant is required to execute an employment application in which Appellant agrees it will not divulge the contents of the application to third persons. The consideration for this agreement is the acceptance for employment and continuing employment

of the applicant. [Affd. of Richard C. Smith, paragraph 4, page 2, Clk. Tr. 79.]

Each of Appellant's employees who are employed in the bargaining unit involved in this proceeding signed these employment applications. There were approximately eight (8) eligible voters employed in the bargaining unit involved in this proceeding at the time that the election was held on May 2, 1966. [Affd. of Richard C. Smith 2, Clk. Tr. 79.]

Representatives of General Warehousemen, Local No. 598 had access to each of Appellant's employees on Appellant's premises during lunch hours and during rest periods at all times prior to the elections which were scheduled. These representatives personally communicated with Appellant's employees on these occasions. [Affd. of Richard C. Smith, paragraph 11, page 3, Clk. Tr. 80-81.]

Prior to both the elections held on May 2, 1966, and the election which was directed for September 12, 1966, Appellant delivered to each of its employees a letter which fairly explained Appellant's policy of non-disclosure, and the Board's *Excelsior* Rule. This letter was accompanied by a properly stamped envelope addressed to the Regional Office of Appellee. The envelope and letter permitted each of Appellant's employees to exercise his own free choice as to whether or not he wanted to supply the Board and General Warehousemen Local No. 598 with his address. [Affd. of Richard C. Smith, paragraph 9, page 3, Ex. "C", Clk. Tr. 80.] Appellee seeks the addresses of Appellant's employees for the *sole purpose* of delivering them to General Warehousemen's Local No. 598.

Specification of Errors.

1. The District Court erred in holding that it had jurisdiction to enforce the Subpena under 29 U.S.C. §161(2) in that the Subpena does not require the production of any evidence relevant to a proceeding before the National Labor Relations Board.

2. The District Court erred in finding that it had jurisdiction to enforce the Subpena under the provisions of 28 U.S.C. §1337.

3. The District Court erred in failing to find that it lacked jurisdiction to enforce the Subpena in that the National Labor Relations Board failed to exhaust its own administrative remedies.

4. The District Court erred in failing to find that enforcement of the Subpena would deprive Appellant's employees of their right to be left alone.

5. The District Court erred in failing to give effect to the contracts of employment which provided for non-disclosure of the names and addresses of the employees, which failure constituted an unjustified deprivation of contract rights.

6. The District Court erred in failing to protect the rights of Appellant's employees under Section 7 of the National Labor Relations Act.

Summary of Argument.

The District Court erred in holding that it had jurisdiction under Section 11(2) of the National Labor Relations Act [29 U.S.C. § 161(2)] for the simple reason that Section 11(2), by its terms, is limited to subpenas requiring the production of evidence. The material sought to be produced by this subpena has no bearing whatever on any action or proceeding pending before the Board. It will, in no way, facilitate Appellee's decision making process. It in no way assists the Board in carrying out its statutorily authorized duties.

The Board in this instance is acting as no more than a conduit for the union. The statutory language in this regard is quite clear. The issuance and enforcement of administrative subpenas of the National Labor Relations Board is limited to subpenas seeking evidence. No matter how broadly we construe the definition of the term "evidence", it is impossible to conclude that the information sought is within the scope of its meaning.

The District Court further erred in finding that it had jurisdiction to enforce the subpena under the general catch-all provisions of Section 1337 of the United States Code. This section, because of its generality, must give way to the specifically applicable sections of the National Labor Relations Act. If we indulge the District Court's findings in this matter, we must conclude that the specific jurisdictional sections of the National Labor Relations Act are of absolutely no meaning or effect. The end result of the Court's holding in

this matter is that it makes absolutely no difference what the Labor Relations Act says with regard to jurisdiction; for even if jurisdiction has not been granted within the well thought out scheme of the National Labor Relations Act it will be imposed on the basis of this catch-all jurisdictional section. Such a holding obviously ignores the intent of Congress.

Moreover, the District Court erred in finding that it had jurisdiction in that Appellee failed to exhaust the administrative remedies available to it. The Board has failed to comply with the enforcement procedures provided it by Congress. It is a well established principle of law that a court will not accept jurisdiction until administrative remedies have been exhausted.

Perhaps the most disturbing feature of the District Court's decision is that in ridgedly applying the *Excelsior* doctrine to this case it violates the constitutional rights of Appellant and Appellant's employees in several instances.

The contractual rights of Appellant and its employees are totally ignored. There is no question that where strong social goals and private property rights are in conflict the property rights may give way under appropriate circumstances. But here the Court has ignored the fact that a reasonable alternative exists by which both ends may be served. The union could fully communicate to Appellant's employees and Appellant and its employees could retain their contractual rights. In such a situation it is clearly unconstitutional to deprive Appellant and its employees of their contractual rights.

With respect to Appellant's employees, it is moreover clear that the enforcement of this doctrine deprives

them of their right of free association and to privacy. This is substantiated by the fact that the Court below ignored the desires voiced by several of the employees to be left alone. The point to be made is this: in the ever more complex and public life men are forced to live, it is absolutely necessary that they be able to control at least a portion of their existence. They should be allowed to freely determine who shall and who shall not be given a license to come knocking at their door any time, day or night.

Section 7 of the National Labor Relations Act protects the right of employees to have union representation and it also provides a statutory right for employees to reject union representation. The employees in declining to have their names and addresses sent to the Board, and in turn to the union, exercised their rights under Section 7 to refuse to hear any more from the union. It is incumbent upon the Board to give this decision by the empolyees dignity equal to that which they would ascribe to a decision favorable to union representation.

ARGUMENT.

I.

The United States District Court Lacked Jurisdiction Over the Subject Matter of This Action.

In the first count of its Complaint, Appellee contended that the District Court had jurisdiction of this proceeding by reason of Section 11(2) of the National Labor Relations Act [29 U.S.C. §161(2)]. That section, in relevant part, provides:

> "In case of contumacy, or refusal to obey a subpena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, *there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question* . . ." (Emphasis added.)

Appellee acknowledges that its subpena power is limited to those instances where it acts within its statutory authority, where its action is not arbitrary, and where the information sought is not "plainly incompetent or irrelevant to any lawful purpose." [Plaintiff's Memo., pp. 4-6; Clk. Tr., 12-14.] But it is not for the Board to determine whether these tests have been met.

As the Court said in *Goodyear Tire & Rubber Co. v. N.L.R.B.*, 122 F. 2d 450, 453 (6th Cir. 1941):

> ". . . the statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court, which is to be judicially exercised . . ."

It is apparent that the standards for subpena enforcement acknowledged by the Board are not present here. This is so because the *Excelsior* doctrine, as applied to the facts of this case is plainly contrary to the employees' and the Appellant's constitutional and statutory rights. (See pp. 20-31 herein for a complete discussion of this point.) Thus, this subpena which seeks to implement that doctrine is neither within the Board's statutory authority nor is it competent or relevant to any lawful purpose. Consequently, the subpena sought to be enforced is invalid and thus, by Appellee's own admission, beyond the jurisdiction of this Court to enforce.

A. The Appellee's Subpena Does Not Seek "Evidence" Touching a Matter Being Investigated.

Section 11(1) of the Act, the section which grants subpena power to the Board, speaks solely in terms of "evidence" and "testimony touching the matter under investigation or in question." Clearly, the matter being investigated or in question in the underlying representation proceeding is the status of the union as majority representative, and not the identity and addresses of

Appellant's employees. Section 11(2) of the Act, which gives United States District Court jurisdiction to issue orders enforcing Board subpenas, states that such orders shall require the person subpenaed to produce "evidence" or give "testimony". Nowhere in the Act is there any provision that the United States District Court shall have the jurisdiction to order the production of anything but testimony or evidence.

> "Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the fact or point in issue, either on the one side or on the other. In legal acceptation, the term "evidence" includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." 31 C.J.S., *Evidence* Section 2; Accord; *N.L.R.B. v. Sun Shipbuilding & Dry D. Co.,* 135 F. 2d 15, 25 (3d Cir. 1943); *N.L.R.B. v. Bell Oil & Gas Co.,* 98 F. 2d 870, 871 (5th Cir. 1938); 3 Wigmore on Evidence, Vol. I, Section 1.

The list of names and addresses sought by the Appellee in no way constitutes evidence. Appellee wishes to have this list for no other purpose than that of turning it over to the union. By no stretch of the imagination can it be said that the presentation of this list to Appellee will tend to prove or disprove any fact at issue before the Board in its representation proceedings. In fact, it is highly doubtful that the Appellee will even examine the list. The Board here is acting simply as a conduit for the transmission of information to the union. The subpena power granted the Board by Congress was intended to aid it in its investigations of

problems within the scope of its authority. It is clear from a reading of the statutes that it was never intended that the Board be allowed to use its broad subpena power to gather information *solely* for its transmission to one of the parties to a representation proceeding.

When the Board issues a document calling for names and addresses, so as to facilitate visits or communications with the persons named, the Board is not calling for testimony or evidence to prove or disprove any fact in dispute or under investigation, and it therefore is not issuing anything that Section 11 of the Act authorizes it to issue, or that Section 11 of the Act authorizes the District Court to enforce. [29 U.S.C. §161 (1) and (2).]

The proposition that administrative subpenas shall not be enforced which seek information which is not evidence in a hearing or proceeding, has been well established by the Supreme Court of the United States in the case *F.T.C. v. American Tobacco Company,* 264 U.S. 298, 306 (1924). In that case it was held:

> ". . . The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence." (264 U.S. at 306).

This principle is clearly reaffirmed in *Goodyear Tire & Rubber Co. v. N.L.R.B.,* 122 F. 2d 450, 453 (6th Cir 1941).

By way of summary, the subpena which Appellee seeks to enforce here does not require the production of evidence or the testimony of witnesses within the well-established meaning of those terms. Moreover it is

unenforceable because of the invalidity of the *Excelsior* doctrine as applied to this case. In either event, Section 11(2) of the Act does not confer jurisdiction on the District Court to grant the order sought by Appellee.

B. The District Court Lacks Jurisdiction Under 28 U.S.C. Section 1337, to Enforce the Excelsior Doctrine.

As an alternative request, Appellee asked the District Court to enforce its *Excelsior* doctrine through the issuance of a mandatory injunction requiring Appellant to file with the Board's Regional Director a list of the names and addresses of Appellant's employees. The District Court found that this alternative basis of jurisdiction was conferred by 28 U.S.C., Section 1337, which provides that:

> "The district courts shall have original jurisdiction of any action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The District Court plainly lacked jurisdiction to grant the Appellee's injunction request. It is clear that general statutes do not confer jurisdiction where the regulatory statute in question precludes it. See *Schilling v. Rogers,* 363 U.S. 66 (1960); *Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 671 (1949); *McCauley v. Waterman S. S. Corp.,* 327 U.S. 540, 545 (1945). And it is equally clear that in enacting the regulatory statute here involved, the National Labor Relations Act (29 U.S.C., Sec. 151, *et seq.*), Congress clearly provided the manner in which it was to be enforced and made effective. See *Amalgamated Utility Workers v. Consolidated Edison Co.,* 309 U.S. 261, 264 (1939), where,

with respect to the National Labor Relations Act itself, the Supreme Court has recognized that "Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." See also, *Switchmens Union v. National Mediation Board,* 320 U.S. 297, 301 (1943).

The foregoing principles were applied in *Uyeda v. Brooks,* 365 F. 2d 326 (6th Cir. 1966), where the Sixth Circuit held that because Congress had provided the manner in which the National Labor Relations Act was to be enforced and made effective, the District Court was foreclosed from exercising jurisdiction. Indeed, the lack of United States District Court jurisdiction in representation cases has been repeatedly upheld by the courts. *Urethane Corp. v. Kennedy,* 336 F. 2d 564 (9th Cir. 1964); *Consolidated Edison Company v. McLeod,* 302 F. 2d 354 (2d Cir. 1962); *Department & Specialty Store Emp. Union v. Brown,* 284 F. 2d 619 (9th Cir. 1961). Moreover, how Congress intended the purposes and provisions of the National Labor Relations Act to be effectuated and enforced is quite clear. Sections 10(e) and 10(f) of that Act clearly contemplate that only "final orders" of the Board, which are issued *only* in unfair labor practice proceedings and not in representation proceedings, shall be reviewed and enforced by judicial action; and the power to review and enforce such actions is vested, moreover, not in the federal district courts, but rather in the circuit courts of appeal of the United States. Thus, in *American Federation of Labor v. Labor Board,* 308 U.S. 401 (1940), the Supreme Court held that a

Board order in representation proceedings under Section 9 of the National Labor Relations Act is not "a final order", and therefore is not subject to judicial review except as it may be drawn in question by a petition for enforcement or review of an order, made under Section 10(c) of the Act, restraining an unfair labor practice. See also *Boire v. Greyhound Corporation,* 376 U.S. 473 (1964), *Cf. Leedom v. Kyne,* 358 U.S. 184 (1958). (Parenthetically, it should be expressly noted in this connection that in this case Appellee did not even seek the enforcement of a Section 9 order it issued in a representation proceeding involving Appellant; rather it sought, under the guise of subpena enforcement proceedings and under a naked claim of district court jurisdiction under 28 U.S.C., Sec. 1337, the enforcement and implementation of a dubious doctrine announced in another representation proceeding, the *Excelsior Underwear* case. Even if Appellee sought enforcement of its own order in the *British Auto Parts Decision* [Complaint Ex. "E", Clk. Tr. 22] that Appellant furnish the addresses of its employees, *American Federation of Labor, supra,* is square authority that such an order is not subject to judicial enforcement.)

This is not to say that federal district courts are completely lacking in jurisdiction with respect to National Labor Relations Board proceedings. But such authority as is given district courts over such proceedings is affirmatively spelled out in the National Labor Relations Act itself. Thus, aside from the power to enforce Board subpenas granted under Section 11, jurisdiction is vested in the district courts under Section 10(j) and 10(1) to grant injunctive relief ancillary to

the Board's powers to prevent unfair labor practices within the meaning of Section 8. Certainly, in view of such specific grants of jurisdictional power, it would be logically inconsistent to say that Congress likewise intended that district courts should also exercise jurisdiction over N.L.R.B. matters under the general jurisdictional grant of 28 U.S.C., Section 1337. For if the latter was in fact the Congressional intent, the specific grants must be regarded as wholly superfluous.

II.

The District Court Lacks Jurisdiction in That Appellee Failed to Allege Exhaustion of the Administrative Remedies Available to It.

Assuming, *arguendo,* the validity of the *Excelsior* theory, Appellee contends that, if its sole sanction in enforcing the doctrine is to set aside elections, persistent noncompliance would block a valid election indefinitely. [Plaintiff's Memo, p. 16, n. 14, Clk. Tr. 24.] In support of its argument, Appellee is forced to abandon a position it has uniformly vigorously pressed since the Board's inception, *i.e.*, that the District Courts have no authority over representation proceedings and that the only court review of such matters is through the unfair labor practice procedures. *American Federation of Labor v. N.L.R.B.,* 308 U.S. 401 (1949). It is indeed startling to find the Board now arguing that ". . . where a court can give relief, there is no ground for withholding it on the speculation that relief could be obtained by some other method". This is precisely the opposite of the position the Board has taken in the hundreds of cases where parties have sought relief in the District Courts to avoid the time-consuming and

frequently impractical procedure of a technical refusal to bargain, leading to an unfair labor practice proceeding under Section 8(a)(5) of the Act.

Here, if the Board is convinced of the merit of its *Excelsior* doctrine, effective enforcement of its position should be had by finding the refusal to furnish the list to be interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act. To argue, as did Appellee, that, because the issue has not been ruled upon in an 8(a)(1) proceeding, the Board must be free to rule upon the question without being compelled to do so in order to enforce its election rule, is to mock reality. If, as contended by Appellee the list is essential to a "fair and reasoned employee choice", it is certainly arguable that failure to furnish the list would be "interference" within the meaning of Section 8(a)(1). Therefore, the Board's reluctance to have the issue ruled upon in an 8(a)(1) case and, instead, to ask this Court to require furnishing the list while contending that the validity of *Excelsior* is not before the Court [Plaintiff's Memo, p. 14, Clk. Tr. 22], is a thinly disguised effort to force compliance with *Excelsior* without court review.

Furthermore, the Complaint on file herein fails to allege whether or not the union represents a majority of Appellant's employees. If the union does have majority status, under the *Bernal Foam Doctrine*[1] the Board could find a violation of Section 8(a)(5) of the

[1]*Bernal Foam Products Co., Inc.,* 146 N.L.R.B. 1277 (1964).

Act and thus order an employer to bargain with the union to enforce its *Excelsior* rule.

Thus, by refusing to attempt to enforce the *Excelsior* doctrine through its unfair labor practice machinery, the Board has failed to comply with the procedures established for it by Congress, and it has failed to exhaust its own administrative remedies. The rule is clear that in such cases, the Court will not exercise jurisdiction until the administrative remedies have been exhausted. In *Myers v. Bethlehem Ship Building Corp.,* 303 U.S. 41, 50-51 (1938) the Supreme Court referred to the "long settled rule of judicial administration that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." On the same point, see *Franklin v. Jonco Aircraft Corp.,* 346 U.S. 378 (1953); *Aircraft and Deisel Equipment Corp. v. Hirsch,* 331 U.S. 752 (1947); *McCauley v. Waterman S. S. Corp.,* 327 U.S. 540 (1946); *Petroleum Exploration, Inc. v. Public Service Commission,* 304 U.S. 209 (1938); *F. P. C. v. Metropolitan Edison Co.,* 304 U.S. 375 (1938).

It is clear that the only way the intent of Congress may be served is by this Court requiring Appellee to follow the administrative procedures established for it by Congress, and enforce its *Excelsior* rule under the provisions regarding unfair labor practices.

III.

The District Court's Application With Wooden Rigidity of the Excelsior Rule to This Case Clearly Violates the Employer's and Employees' Constitutional and Statutory Rights.

The application of the *Excelsior* doctrine to the instant case violates Appellant's constitutional rights. It also violates three fundamental constitutional rights of Appellant's employees. They are the rights of freedom of association, the right to privacy and the right of freedom of contract. The application of the *Excelsior* doctrine also violates the employees' rights under Section 7 of the National Labor Relations Act.

A. The Employer's Constitutional Rights.

All of Appellant's employees have signed employment applications. Some of these applications provide:

> "All information contained in this application is confidential and will not be divulged without written permission of the person signing this form."

The remaining applications provide:

> "Further, it is agreed that all information contained in this application and on the federal W-4 form (if I am hired) is confidential information and cannot be divulged to any Federal, State or other governmental agency, or any individual or firm while I am in the employ of this company without my express written authorization." [Affd. of Richard C. Smith, Exs. "A" and "B", Clk. Tr. 80-81.]

In these employment applications Appellant has plainly and clearly contracted with its employees *not* to dis-

close the contents (including the employees' addresses) of employment applications signed by its employees. The consideration for this contract is provided by the acceptance of employment by the employee and his continued employment. *Bullock v. Sterling Drug, Inc.,* 93 F. Supp. 371 (E. D. Penn. 1950), affirmed; 187 F. 2d 145 (3d Cir. 1951); *Chinn v. China Nat. Aviation Corp.,* 138 Cal. App. 2d 98 (1955); *Hunter v. Sparling,* 87 Cal. App. 2d 711 (1948). Appellee did not even question the existence of a binding contract below.

Thus, there are valid contract rights which are now in existence between Appellant and its employees. Appellee seeks to destroy these rights by a wooden application of the rule in the *Excelsior* case to the instant case.[2]

The constitutional status of contract rights has been repeatedly established by the courts. *Highland v. Russell Car and Snow Plow Co.,* 279 U.S. 253 (1928); *Prudential Insurance Co. v. Cheek,* 259 U.S. 530 (1921); *Boeing Air Transport v. Farley,* 75 F. 2d 765 (D.C. Cir. 1935). In *Lynch v. United States,* 292 U.S. 571 (1933) the court stated:

> "The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property,* whether the obligor be a private individual, a municipality, a State or the United States." (292 U.S. at 579. Emphasis added.)

Furthermore, it is clear that any party to a contract has standing to object to governmental action which

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[2]In this connection it is pertinent to note that in *Excelsior* there was no contract in existence between the employees and the employer prohibiting disclosure.

seeks to deprive such a party of his property rights. *Everglades Drainage District v. Florida Ranch & D. Corp.*, 74 F. 2d 914, 917 (5th Cir. 1935).

Admittedly the property rights created in Appellant by its contracts with its employees are not absolute. They are, of course, subject to reasonable regulation. See *Prudential Insurance Co. v. Cheek, supra; Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 228 (1899).

However, the correct balancing of an employer's property rights with the right of a union to communicate with the employer's employees has already been clearly established by the courts, and the wooden application of the *Excelsior* rule to the instant case is squarely contrary to that correct balancing.

In *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) the United States Supreme Court considered the question of the circumstances, if any, under which an employer's property rights must yield to allow union organizers to come onto his premises to communicate with his employees. The Court addressed itself to the question of balancing as follows:

> "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by non-employ-

> ees to communicate with them through the usual channels, the right to exclude from peroperty has been required to yield to the extent needed to permit communication of information on the right to organize." (351 U.S. at 112.)

The court otherwise stated the principle of *Babcock & Wilcox* as follows:

> "It is our judgment, however, that an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. In these circumstances the employer may not be compelled regulations as the orders in these cases permit. (351 U.S. at 112.)

Thus, the rule is plain that an employer's property rights will *not* be required to yield to the attempts of outside union organizers to communicate with his employees where reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message.

The principle of *Babcock & Wilcox* was relied upon by the Sixth Circuit in *May Department Stores v. N.L.R.B.*, 316 F. 2d 797 (6th Cir. 1963). In *May*, the Board had decided that in an organization campaign an employer could not deny a union an equal opportunity to reply, on company time and property, to the employer's anti-union, but non-coercive, speeches.

The Board theorized that the employer's action *per se* created a "glaring imbalance in opportunities for organization communications." The Court of Appeals, however, relying specifically on the principles laid down by the Supreme Court in the *Babcock & Wilcox* case, *supra,* and on an earlier Sixth Circuit decision, *N.L.R.B. v. F. W. Woolworth,* 214 F. 2d 78 (6th Cir. 1954), reversed the Board. The Court emphasized that there was no Board findings of "non-accessibility amounting to a handicap to self-organization" or "that the employees, away from the employer's premises are removed or isolated from normal, usual communications." The Court said:

> ". . . neither the use of the magic word 'imbalance' nor the characterization of alternative avenues of communication as 'ineffective' . . . can give the union a right of access which the Supreme Court of the United States has refused to recognize and which it does not possess." (316 F. 2d at 801.)

When the principle of these decisions is applied to the facts of the instant case, the following is apparent:

1. Appellant has contracted with its employees not to disclose their names and addresses to outside interests;

2. These contracts constitute valid property rights under the due process clause of the Fifth Amendment to the United States Constitution;

3. The United States Supreme Court has plainly and clearly held that an employer's property rights will yield to an outside union's attempts to communicate with employees *only* where reasonable alternative means of communication are unavailable;

4. There has been no finding that alternative means of communication with Appellant's employees by Local 598 of the Teamsters are unavailable;

5. In fact, representatives of Local 598 were expressly invited to come onto the Appellant's premises and communicate with its employees during their non-working time [Affd. of Norman E. Jones, Ex. "A", Clk. Tr. 77] and they did not accept this invitation to communicate with Appellee's employees. [Affd. of Richard C. Smith, paragraph 11, Clk. Tr. 81];

6. The attempt by Appellee to force a wooden compliance with its *Excelsior* rule in the circumstances of this case is *squarely contrary* to the provisions of the Fifth Amendment to the United States Constitution and the principle of *Babock & Wilcox,* and should not be allowed.

B. The Employees' Constitutional Rights to Free Association and Privacy.

The United States Supreme Court has carefully considered the constitutional rights of members of a group to keep their identity and addresses secret. In *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958), the Court said:

> "We think that the production order (for the names of the members of the NAACP in Alabama) . . . must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." (357 U.S. at 462).

The list in the *Alabama* case was to be furnished to a government official, the state attorney general. Here Appellee seeks to furnish the list to Local 598 of the Teamsters Union, a private organization.

In recent years the field of law concerning the right of privacy has undergone extensive consideration. The Supreme Court in *Griswold v. State of Connecticut,* 381 U.S. 479, 484-485 (1965), reiterated the pervasive notion that a man's privacy is a right subject to Constitutional protection. It said:

> "The Fourth and Fifth Amendments were described in *Boyd v. U.S.*, 116 U.S. 616, 630, . . . as protection against all governmental invasions of the 'sanctity of a man's home and the privacy of life.' We recently referred in *Mapp v. Ohio,* 367 U.S. 643, 656, . . . to the Fourth Amendment as creating a 'right of privacy no less important than any other right carefully and particularly reserved to the people.' " (381 U.S. at 484-485.)

The common and statutory law of the various states also has continued to expand the concept by providing new and varied causes of action for invasions of privacy. In a recent note on the right to privacy, *40 Notre Dame Law* 324 (1956), the authors state that at least 31 jurisdictions have recognized rights of action based on concepts of privacy.

The right of private citizens to be free from bothersome intrusions into their private lives is also the subject of another line of judicial authority. These decisions plainly uphold the constitutionality of municipal ordinances which prohibit door to door canvassing where the resident has not previously manifested his

consent to be called upon. *Breard v. Alexandria,* 341 U.S. 643 (1951); *Green River v. Fuller Brush Co.,* 65 F. 2d 112 (10th Cir. 1933).

These decisions hold that the constitutional right of the resident to be left alone outweighs the constitutional rights of outsiders to communicate with him at his home.

The parallel to the instant case is striking. Here the employees have affirmatively manifested a desire to be left alone. The rights of outside union organizers, whatever they may be, most certainly fall short of the employees' rights to be left alone.

Likewise the standing of an employer to assert the right to be left alone of its employees is just as great as the standing of a municipality to assert the right of its residents to be left alone.

Appellee's position in the instant case is particularly contrary to the rights of Appellant's employees to freely associate and be "left alone" for the following reasons:

1. Each of Appellant's employees was given a letter affixed to a postage prepaid envelope, properly addressed to the Regional Director of the National Labor Relations Board. [Affd. of Richard C. Smith, Ex. "C", Clk. Tr. 81.]

2. By the simple expedient of the employee placing his name and address upon the space provided at the bottom of the letter and placing it in the mail, each employee could exercise his personal prerogative to receive written and personal communications from the union organizers at their homes. In fact Exhibit "D" to the complaint on

file herein (page 19) reveals that two employees did exercise this right.

3. Conversely, it is obvious that those employess who *refrained* from following this simple expedient, then and there exercised their *personal right* to refrain from associating with union organizers who would knock upon the doors of their homes in the middle of the night or bother their wives at the dinner hour. They exercised their right of privacy, and they did so in absolute secrecy. [Affd. of Richard C. Smith, paragraph 10, Clk. Tr. 81.]

4. Appellee's position in this case is to destroy the rights of freedom of association and to privacy, which Appellant's employees have affirmatively sought to exercise by voluntarily refraining from providing the N.L.R.B. and hence the union organizers, with the means of invading these rights.

C. Violation of the Property Rights of Appellant's Employees.

As pointed out *supra,* at page 20, each of Appellant's employees is a party to a valid and enforceable contract in which Appellant has obligated itself to refrain from disclosing their addresses to outsiders.

These contract rights are clearly "property" of the employees. *Lynch v. United States,* 292 U.S. 571 (1934); *Prudential Insurance Co. v. Cheek,* 259 U.S. 530 (1921); *Boeing Air Transport v. Farley,* 75 F. 2d 765 (D.C. Cir. 1935).

The employees' constitutional right to be free from deprivation of *their* property is just as real and substantial as the constitutional right of free association

which was upheld in *Louisiana v. N.A.A.C.P.,* 366 U.S. 293 (1961) and *N.A.A.C.P. v. Alabama,* 357 U.S. 499 (1958). Furthermore, the right of Appellant to assert its employees' constitutional property rights in the instant case is on a parity with the right of the N.A.A.C.P. to assert its members' constitutional rights in *N.A.A.C.P. v. Alabama, supra,* and *Louisiana v. N.A.A.C.P., supra.*

The relief sought by Appellee in the instant case will destroy these very rights which the employees have attempted to assert by refraining from providing the union with their names and addresses. Such a destruction, in the face of the principal of *Babcock & Wilcox* and *May Company* that property rights shall not yield where alternative methods of communications are available, should not be sanctioned by this court.

D. Violation of the Statutory Rights of Appellant's Employees.

Section 7 of the National Labor Relations Act provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." (Emphasis added.)

The importance of employees' Section 7 rights is well stated in *Shoreline Enterprises of America v. N.L.R.B.*, 262 F. 2d 933 (5th Cir. 1959):

> "This view disregards an important party at interest under the Act and beyond the Act—the rank-and-file employee."
>
> * * * *
>
> "The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees. Their voice, though still and small, commands a hearing. The interest of a rank-and-file worker in selecting an economic representative having the power to fix wages and working conditions is no less important than a citizen's interest in selecting a political representative. It is not necessary to decide that this interest is a right protected by the constitution. The National Labor Relations Act vests the Board with discretionary authority to conduct a fair election—fair for individual employees, as well as for the Company or for the Union."
>
> * * * *
>
> "The Court has great respect for the National Labor Relations Board in its zealous, fairhanded administration of the Act. In this case, however, Board agents nodded when they should have been alert and active. Individual rank-and-file employees, caught in the toils of selfish complexities of honest company-union negotiations, are entitled to look to the Board for protection of their rights." (262 F. 2d at 944-946.)

In the instant case the facts are clear and without contradiction that each of Appellant's employees was given the simple opportunity to provide their names and addresses to the Board's Regional office.

Two employees *exercised* their Section 7 rights to furnish their names and addresses to the union. The remaining employees *exercised* their Section 7 rights to "refrain" from any such activity by refraining from furnishing their names and addresses to the union. By so refraining, each such employee plainly, clearly and unequivocally manifested his desire to be free from the following union conduct:

1. Repeated personal visits at day or night by persistent union organizers which are disruptive of home and family life;

2. Repeated telephone calls at day or night by union organizers which are equally disruptive of home and family life;

3. Repeated mailings which are an unwelcome inconvenience.

The significance of freedom from such conduct is well expressed by the United States Supreme Court in *Breard v. Alexandria,* 341 U.S. 622 (1951):

> "Unwanted knocks on the door by day or night are a nuisance or worse to peace and quiet." (341 U.S. at 626-27.)

Appellee in the instant case, contrary to the admonition in *Shoreline Enterprises, supra,* is attempting to disregard the employees' clearly expressed desires to avoid these intrusions. Thus, Appellee is acting squarely in disregard of the provisions of Section 7 of the Act and this court should not sanction such conduct. Otherwise stated, the Board *Excelsior* rule as applied to this case is contrary to the provisions of Section 7 of the Act, and should *not* be enforced.

IV.

Conclusion.

Appellant's motion to dismiss, or in the alternative, its motion for summary judgment should have been granted for the following reasons which have been fully discussed in this memorandum:

1. The District Court was without jurisdiction to grant the relief requested, in that:

   a. Section 11(1) of the Act only authorizes the issuance of an order requiring the production of *evidence* touching a matter under investigation or in question, and the documents sought by plaintiff do not constitute such evidence;

   b. The jurisdiction of the District Court is limited to enforcement of valid rules or orders of the Board and the attempted application of the Excelsior doctrine in the instant case is invalid and contrary to statute;

   c. The provisions of 28 U.S.C. Section 1337 do not grant any general jurisdiction to this court where the National Labor Relations Act has expressly and specifically limited its jurisdiction.

2. The attempted application of the *Excelsior* doctrine to this case is squarely contrary to the Appellant's and its employees' constitutional and statutory rights.

Dated: November 16, 1967.

Respectfully submitted,

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DAVID A. MADDUX,
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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. MADDUX